

WT 05-251

FCC - MAILROOM

AUC-03-52

PETITION FOR RECONSIDERATION

³ See In the Matter of Rainbow DBS Company LLC and EchoStar Satellite L.L.C. Consolidated Application for Consent to Assignment of Space and Earth Station Licenses and Special Temporary Authority, IB Docket No. 05-72, File Nos. SAT-ASG-2005-0128-00017; SES-ASG-2005131-00117 ("Joint Application").

DBS channels.⁴ As EchoStar and Rainbow DBS have previously pointed out to the Commission in their *Joint Application*, "[t]here simply is no basis for maintaining any such restrictions in light of these changed facts."⁵

I. BACKGROUND AND INTRODUCTION

On March 3, 2003, the Commission sought comment on the auction of DBS licenses located at the 175° W.L., 166° W.L., 157° W.L. and 61.5° W.L. orbital locations.⁶ The EchoStar and Rainbow DBS comments and reply comments in this proceeding primarily addressed eligibility restrictions for the two unassigned DBS channels at the 61.5° W.L. orbital location. On January 15, 2004, the Commission determined that it had the authority to auction the DBS licenses and declined to adopt any eligibility restrictions for the 175° W.L., 166° W.L., and 157° W.L. orbital locations. However, the Commission deferred any determination on the eligibility for the two remaining DBS channels at 61.5° W.L. for a later time because of the conflicting comments submitted on this issue.⁷

On December 3, 2004, the Commission issued its *61.5° W.L. Eligibility Order*. In that Order, the Commission prohibited "any licensee currently operating satellites at orbit locations capable of providing DBS service to the 50 U.S. states ... from acquiring, owning, or

⁴ Cablevision and Rainbow DBS have informed EchoStar that they do not oppose the elimination of these eligibility restrictions and EchoStar's petition for reconsideration in this proceeding.

⁵ See *Joint Application* at p. 10.

⁶ See Public Notice, *Auction of Direct Broadcast Satellite Service Licenses Scheduled for August 6, 2003*, Report No. AUC-03-52-A, 18 FCC Rcd. 3478 (rel. March 3, 2003).

⁷ See *In the Matter of Auction of Direct Broadcast Satellite Licenses*, ALJ-03-52, Order, FCC 04-08 (rel. Jan. 15, 2004).

controlling" the license for the two channels at 61.5° W.L. at issue here."⁸ This restriction was based entirely on the Commission's view at that time that these two unassigned DBS channels would be placed into more productive use if they were made available to a new DBS competitor, such as Rainbow DBS.⁹ However, in light of fundamentally changed circumstances and because enabling established DBS licensees to bid on this spectrum would promote competition in the Multichannel Video Programming Distributor ("MVPD") market, the Commission should no longer apply these eligibility restrictions to the upcoming 61.5° W.L. auction.

II. THE DECISION TO SHUT DOWN THE VOOM DBS SERVICE IS A CHANGE IN CIRCUMSTANCES REQUIRING RECONSIDERATION

In its *61.5° W.L. Eligibility Order*, the Commission stated that adopting a DBS eligibility restriction would serve to promote the development of an additional DBS provider and would therefore be in the public interest.¹⁰ In so finding, the Commission did not apply the competitive harm standard in light of the fact that the "unique circumstances of the 61.5° W.L. license provide[d] [it] with an opportunity to encourage the development of an additional provider of DBS service."¹¹ The "unique circumstances" cited by the Commission were that Rainbow DBS had just launched a state-of-the-art satellite and had begun offering an innovative yet nascent service that could better use the two remaining DBS channels at that location.

Soon after the release of the *61.5° W.L. Eligibility Order*, however, Cablevision announced that it was suspending its planned spin-off of Rainbow Media Enterprises and that it

⁸ *61.5° W.L. Eligibility Order* at ¶ 1.

⁹ *Id.* at ¶¶ 15-23, 31.

¹⁰ *Id.* at ¶¶ 20, 22, 23, 25, 27, 31.

¹¹ *Id.*

would instead "pursue strategic alternatives for its Rainbow DBS business."¹² Not long thereafter, Cablevision's Board confirmed its decision to discontinue the VOOOM DBS service,¹³ and the service has now shut down.¹⁴ Consequently, as noted by Rainbow DBS and EchoStar in the *Joint Opposition*, "the 'unique circumstances' cited by the Commission have demonstrably changed. It is clear that no other provider will launch a satellite with such limited capacity (two DBS channels) because, as the Commission has consistently noted, a successful DBS business requires the aggregation of many channels at an orbital location."¹⁵ This changed circumstance alone has materially altered the facts relied on by the Commission in issuing the 61.5° W.L.

Eligibility Order.

Such changed circumstances are also illustrative of the limited potential for a new DBS entrant in the MVPD market. Specifically, it is highly unlikely that any other DBS provider will launch a satellite into the 61.5° W.L. orbital location with such limited capacity (two DBS channels) because a successful DBS business requires the aggregation of many channels at any orbital position. Realistically, two channels are not sufficient for a viable,

¹² See Cablevision Systems Corp. 8-K (filed December 21, 2004) ("Cablevision Systems Corporation announced today that its Board of Directors has decided to suspend pursuing the spin-off of its Rainbow Media Enterprises subsidiary, in its previously announced form, and instead to pursue strategic alternatives for its Rainbow DBS business.")

¹³ See Cablevision Systems Corp., SEC Form 8-K, at 2 (filed April 8, 2005); In the Matter of Rainbow DBS Company LLC and EchoStar Satellite L.L.C., Consolidated Application for Consent to Assignment of Space and Earth Station Licenses and Special Temporary Authority, *Opposition to Joint Petition To Deny*, IB Docket No. 05-72, at 8-13 (filed April 12, 2005) ("*Joint Opposition*").

¹⁴ As of April 30, 2005, the subscription DBS service offered by Rainbow DBS is no longer available to consumers. Portions of the original VOOOM HD programming that were a part of the VOOOM DBS service are still available to consumers through an agreement with EchoStar on its DISH Network.

¹⁵ See *Joint Opposition*, at p. 14.

competitive service.¹⁶ As the Commission has recognized, "DBS licensees with a small number of channels face capacity limitations that may hamper their ability to compete effectively in that [MVPD] market."¹⁷ Cablevision's decision to discontinue the VOOM DBS service illustrates the difficulty of establishing a DBS service under current market conditions based on limited spectrum. Even with the use of thirteen DBS channels at the 61.5° W.L. orbital location,¹⁸ Rainbow was only able to attract approximately 40,000 subscribers, an inadequate number of subscribers to sustain the business. As Rainbow DBS and EchoStar pointed out in the *Joint Opposition*, "[t]he Rainbow DBS strategy of developing a unique and robust HDTV product, while innovative, was insufficient to secure a profitable market niche as few subscribers were willing to pay the premium price for the product and not enough HDTV television sets were purchased by consumers."¹⁹

The 61.5° W.L. Eligibility Order fails to explain how an additional full service DBS provider would become viable using only two DBS channels at the 61.5° W.L. orbital

¹⁶ See Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, 11 FCC Rcd 9712, 9764 ¶ 134 (1995) ("1995 DBS Auction Order"); United States Satellite Broadcasting Co., Inc., and DIRECTV Enterprises, Inc., Order and Authorization, 14 FCC Rcd 4585, 4595 ¶ 22 (1999) (it would be "commercially difficult to finance and construct a satellite" designed with just three channels); Advanced Communications Corporation Application for Extension of Time to Construct, Launch, and Operate a Direct Broadcast Satellite System, Memorandum Opinion and Order, 14 FCC Rcd 3399, 3425-26 ¶ 70 (1995) ("four channels may not provide sufficient capacity to operate a viable system, [and] such piecemeal assignment of channels could render ... [an] orbital location ... unusable by any single permittee").

¹⁷ Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, 11 FCC Rcd. 9712, ¶ 134 (1995).

¹⁸ Rainbow operated on 11 regularly licensed DBS channels at 61.5° W.L., in addition to channels 23 and 24 under Special Temporary Authority. See *Rainbow DBS Company, LLC, Application to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. Orbital Location*, DA 03-3024, Order and Authorization, SAT-STA-20030623-00122 (rel. Oct. 1, 2003).

¹⁹ See *Joint Opposition* at pp. 10-11 (footnotes omitted).

location given that cable MSOs and existing DBS providers have much more bandwidth available to provide their MVPD services, nor could it in the face of the Commission's prior conclusion about the need for a minimum aggregation of channels for MVPD service. While the *61.5° W.L. Eligibility Order* concludes that an eligibility restriction would be in the public interest even if it only allowed the development of a specialized or niche DBS provider that is a complement to existing DBS services, the recent demise of the VOOM service strongly suggests that such an eligibility restriction is insufficient to support the development of a niche DBS provider. Other than Rainbow DBS, no other potential DBS provider has expressed any interest in acquiring the two remaining DBS channels at the 61.5° W.L. orbital location during the almost two years that this proceeding has been active. In fact, in the recent auctions for 93 DBS channels at the western DBS orbital slots, EchoStar and Rainbow DBS were the only qualified bidders.²⁰ This is not surprising given the large fixed costs of launching a DBS business. A new entrant would need to have a sizable base of customers to make service economically viable, and it would be difficult to achieve a sufficiently large base of customers with a specialized or niche DBS service. In any event, as pointed out by Rainbow DBS and EchoStar in the *Joint Opposition*, the *61.5° W.L. Eligibility Order* does not undertake any analysis of the viability of such a niche DBS provider.²¹

As the Commission is aware, Rainbow DBS's venture was not the first time that an attempt to launch a third national DBS service has failed. In 1996, MCI acquired the rights to 28 DBS channels at 110° W.L. (a full CONUS slot) in hopes of becoming the third facilities-

²⁰ See Direct Broadcast Satellite Service Licenses Auction - 2 Qualified Bidders, *Public Notice*, DA 04-1957, Report No. AUC-04-52-H (Auction 52) at Attachment A (June 28, 2004).

²¹ See *Joint Opposition*, at p. 14.

based DBS provider in the United States.²² At the time, MCI possessed the financial strength to finance a winning bid of \$682.5 million for the DBS channels, and it was the second largest U.S. carrier of long distance telecommunications services, holding FCC domestic common carrier microwave licenses, international facility authorizations, cable landing licenses, as well as authorizations in other services.²³ In addition, MCI was partnering with News Corporation Limited ("News Corp") to leverage News Corp's experience in video programming.²⁴ Despite its financial strength and business acumen, MCI never launched a satellite or developed a video programming service. MCI made the determination that its proposed business plan for the DBS service simply was not viable, and the Commission allowed MCI to exit the business by selling its satellite authorization and assets to EchoStar.²⁵

In short, the recent developments regarding Rainbow DBS, the FCC's DBS auction history, and the economics of providing DBS service using a limited number of DBS channels, undercut the rationale in the *61.5° W.L. Eligibility Order* that imposing eligibility restrictions will promote the development of an additional DBS provider. Accordingly, the Commission should remove these eligibility restrictions before conducting its next DBS auction.

III. REMOVAL OF THE ELIGIBILITY RESTRICTIONS WILL PROMOTE COMPETITION AND PRODUCE PUBLIC INTEREST BENEFITS

The Commission should also reconsider the *61.5° W.L. Eligibility Order* because an auction of the last remaining DBS channels at 61.5° W.L. that includes EchoStar as an

²² See MCI Telecommunications Corporation, *Order*, 11 FCC Rcd 16275, 16290 ¶ 36 (1996) (granting authorization for MCI to construct, launch and operate a DBS satellite over 28 channels at 110° W.L.).

²³ *Id.* at 16275-76 ¶¶ 2-3.

²⁴ *Id.* at 16277 ¶ 7.

²⁵ See MCI Telecommunications Corp., *Order and Authorization*, 16 FCC Rcd. 21608, 21630 ¶ 46 (1999) ("MCI Assignment Order").

eligible bidder would promote competition and produce public interest benefits, while retaining the eligibility restrictions will harm competition in the MVPD market.

The Commission's treatment of the MCI DBS authorizations is instructive in showing that eliminating such eligibility restrictions would promote the public interest. In the auction in which MCI acquired its DBS license, the FCC imposed an eligibility restriction that required entities with an attributable interest in DBS channels at a full-CONUS location (i.e., DIRECTV and EchoStar) to divest that interest if they acquired DBS channels at the auction.²⁶ Nonetheless, in the face of changed circumstances, the FCC approved the assignment of MCI's DBS license to EchoStar despite this restriction,²⁷ concluding "on balance the proposed transaction, if approved, would benefit competition in the affected markets more than harm it."²⁸

A similar analysis applies here. While it may have been true upon the launch of the VOOM service that Rainbow DBS represented the "last opportunity in the near term for entry within the DBS service itself,"²⁹ Rainbow DBS has now discontinued its DBS operations. Under these circumstances, opening up the eligibility for the two remaining DBS channels to existing DBS operators at 61.5° W.L. "will benefit competition in the affected markets more than harm it."

Moreover, eliminating the eligibility restriction here would actually serve to promote competition if an established DBS provider were to win the spectrum at auction.³⁰ The

²⁶ See 1995 DBS Auction Order, 11 FCC Rcd 9712, 9732-9743 ¶¶ 52-79.

²⁷ See MCI Assignment Order, 16 FCC Rcd at 21617-19 ¶¶ 17-21.

²⁸ *Id.* at 21617, 19 ¶ 17.

²⁹ Petition of R/L DBS Company, L.L.C. for Extension of Its Direct Broadcast Satellite Construction Permit, *Memorandum Opinion and Order*, 16 FCC Rcd 9, 16 ¶ 19 (2000) ("Rainbow DBS Extension Order").

³⁰ Of course, if a new entrant believed this spectrum could be put to productive use, it would still have the ability to bid for it at auction.

resulting increase in bandwidth and satellite capacity, even though relatively slight, would allow the winner to compete more effectively in the MVPD market. The Commission recognized in the *MCI Assignment Order* that increased system capacity would allow EchoStar to become a more effective competitor.³¹ Similarly, the removal of eligibility restrictions at 61.5° W.L. would allow consumers to benefit from increased competition in the MVPD market.

Indeed, a winning bidder will have every incentive to deploy these resources to maximize its ability to compete with other MVPD providers.³² The *2004 MVPD Competition Report* states that the "cable industry has upgraded almost 91 percent of its plant to 750 MHz capacity or higher."³³ EchoStar, for example, has significantly lower bandwidth capacity to supply programming to its customers. As a result, cable operators have been able to offer digital tiers and advanced services not offered by DBS providers.³⁴ The Commission has recently noted that while increased competition in the MVPD market has led to improvement in cable service, it has not led to lower prices for cable services.³⁵ With greater spectrum resources and more DBS channels available even to established satellite providers, the resulting enhancements to MVPD service and price competition will allow consumers to realize even greater benefits from

³¹ See *MCI Assignment Order*, 16 FCC Rcd at 21618-19, 26 ¶¶ 20-21, 36.

³² See *Joint Opposition, Declaration of Jonathan M. Orszag and Simon J. Wilkie* ¶ 14 (filed April 12, 2005) ("Orszag-Wilkie Declaration").

³³ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, *Eleventh Annual Report*, FCC 05-13 ¶ 14 (rel. Feb. 4, 2005) ("*2004 MVPD Competition Report*").

³⁴ See *id.* ¶ 6 ("Cable operators in response to the growth of DBS have made upgrades and advances in their offerings. The number of cable subscribers selecting digital tiers and advanced services not offered by DBS continues to grow.").

³⁵ See *id.* ¶ 4 ("Increased competition in the market for the delivery of video programming since our first Report has led to improvements in cable television services, including more channels of video programming and more service options, but generally not lower prices.").

competition in the MVPD market.³⁶ Thus, because competition would be promoted by reconsidering the eligibility restrictions, rather than thwarted, the Commission should take the opportunity to do so now by reconsidering its eligibility restrictions.

IV. CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that the Commission eliminate the eligibility restrictions imposed in the *61.5° W.L. Eligibility Order* —

Respectfully submitted,

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³⁶ See Orszag-Wilkie Declaration ¶ 19.